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First of Denver Mortgage Investors and Citibank, N. A. v. C. N. Zundel and Associates et al : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST OF DENVER MORTGAGE INVESTORS; and CITIBANK, N.A.

Plaintiffs and Appellants,

-vs-

C. N. ZUNDEL AND ASSOCIATES, a limited partnership; MOUNTAIN SPRINGS CONSTRUCTION COMPANY OF UTAH, a Utah corporation; MOUNTAIN SPRINGS CONSTRUCTION COMPANY, a California corporation; F. D. ASHDOWN and ALFRETTA B. ASHDOWN, Trustees; FMA LEASING COMPANY; DUNCAN ELECTRIC SUPPLY, INC.; HOLT-WITMER INTERIORS, et al.,

Case No. 15696

Defendants and Respondents.

BRIEF OF DEFENDANT-RESPONDENT CHILD BROTHERS, INC.

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NATURE OF THE CASE

This action involved the foreclosure of a mortgage against a subdivision known as LAKEVIEW TERRACE SUBDIVISION, brought by the appellant. The District Court of Davis County awarded eight (8) lien claimants a first priority of an aggregate $44,732.86 over the appellant's Trust Deed from which ruling the appellant appeals. The respondent-cross appellant, Child Brothers, Inc., appeals from the dismissal of its Crossclaim against defendant C. N. Zundel and Associates and Mountain Springs Construction Company of Utah, for failure of warranty for property deeded to Child Brothers Inc., and for damages incurred to Child Brothers, Inc., for its work performed on Lakeview Terrace Subdivision.

DISPOSITION IN LOWER COURT

On January 12, 1978, the trial court heard all motions for Summary Judgment, and thereafter on January 24, 1978, awarded eight (8) lien claimants first priority over the appellant's Trust Deed, and dismissed all Counterclaims and Crossclaims in this action. Thereafter, on February 1, 1978, the Court again ordered Summary Judgment for the respondents for their liens amounting to $44,732.86, and dismissed all Counterclaims and Crossclaims in the action without having taken any testimony.

RELIEF SOUGHT ON APPEAL

It is from the February 1, 1978, Order dismissing all Crossclaims and Counterclaims that Child Brothers, Inc., seeks reversal and remand to the lower court that a trial may be held on its Crossclaim against C. N. Zundel and Associates and Mountain Springs Construction Company of Utah. Child Brothers, Inc., further seeks that the Court uphold the trial court's determination giving it and the other lien claimants first priority over the Trust Deed of the appellant.

FACTS OF THE CASE

On November 15, 1973 Child Brothers, Inc., (hereinafter referred to as Child) commenced the first work that it performed on the subject property known as the Lakeview Terrace Subdivision, by doing pipeline, water system, storm drains and sewer system work. (Deposition of Eugene Child, p.5). The work which was performed by Child was performed prior to the recording of the Trust Deed between Zundel and Associates (hereinafter referred to as Zundel) and First of Denver Mortgage Investors (hereinafter referred to as FDMI), which Trust Deed covered the subject property and was recorded on February 19, 1974. Child continued to work on the subject property throughout the years 1974, 1975 and 1976. During the period between March and June, 1976, Pat Sinclair of Mountain Springs Construction Company of Utah

(hereinafter referred to as Mountain Springs), the successor in interest to Zundel, persuaded Eugene Child, president of Child Brothers to take a Warranty Deed to 2 lots on the subject property in order that Mountain Springs could continue with the work on the project. (See Deposition of Eugene Child p. 17). In June, 1976, a check in the amount of $13,210.00 along with a Warranty Deed to two (2) lots in the subject subdivision, were given to Child for the obligation owing to it by Zundel and Mountain Springs in the approximate sum of $22,000.00. (Deposition of Eugene Child p. 19). Eugene Child was informed by both Pat Sinclair of Mountain Springs and a Mr. Kenyon Gurr of Security Title, who was doing the title work for Mountain Springs on the subdivision, that there was a $12,000.00 mortgage or a 70% selling price mortgage, whichever was greater, on the property, and that by taking the lots Child would be assured of receiving all the money due him. (Deposition of Eugene Child p.23 through 26). However, neither Mr. Sinclair nor Mr. Gurr informed Eugene Child that the title to the property would be worthless within a week's time because there was a default provision in the Trust Deed which required the $12,000.00 or 70% selling price to be paid by July 1, 1976 or else the property would automatically revert back to FDMI. (Deposition of Eugene Child p. 27).

Based upon the representations of Mr. Gurr and Pat Sinclair, Child took the Warranty Deed to the lots and thereafter decreased the balance owing to it by Zundel/Mountain Springs by approximately $22,000.00. A release of all liens and claims was recorded on June 22, 1976, which was signed by Eugene Child on behalf of Child Brothers Inc., though Mr. Child was unaware of ever having signed the document.

(Deposition of Eugene Child p. 23). Thereafter Child, continued to work on the project and did its last work on October 1, 1976. (Deposition of Eugene Child p. 33). A Notice of Lien was thereafter filed by Child on November 30, 1976.

Zundel conveyed its interest in the subject property to Mountain Springs on August 8, 1975. The shareholders of Mountain Spring were the same individuals (with the exception of C. N. Zundel) as the limited partners of Zundel and Associates with Pat Sinclair as the new president and executive officer of Mountain Springs. Child was not informed of the change in ownership of the property at the time it occurred, but discovered the transfer at a much later date. (Deposition of Eugene Child pp. 14 and 20). At all times, Child was requested to continue its work by the parties who appeared to be the same personnel, with only a change in name. Child never opened a new account with Mountain Springs, but merely transferred the balance owing to it from Zundel work to Mountain Springs.

The appellant commenced this action upon the default of Mountain Springs on the Notes due and owing to it which were secured by the subject property. On November 30, 1977, Child entered this suit and Crossclaimed against Zundel and Mountain Springs for the money due it for the work performed, and also for failure of warranty on the two lots which were conveyed to Child. (R-428).

The minute entries of December 8, 1977 and December 12, 1977 stated that the appellant would foreclose on the property for $1,900,000.00, and take no deficiency. (R-443 and 453). Thereafter on December 20, 1977, the trial court entered Judgment and Decree of Foreclosure wherein appellants were granted Judgment for $2,358,396.00

but that appellants would only look to the subject property for $1,900,000.00 of its Judgment. (R-488) Thereafter the subject property was sold on January 19, 1978 at a Sheriff's Sale with the appellant , F.D.M.I., being the sole bidder for the subject property and bidding the amount of its Judgment against the subject property in the amount of $1,900,000.00. (R-637 and 641) The trial court thereafter determined the priority of liens and placed the lien claimants in a first priority position over the Trust Deed of the appellant. The appellant thereafter amended its bid to the amount of $1,944,732.86. (R-614, 627 and 629) The trial court thereafter, on February 1st, dismissed all Crossclaims and Counterclaims (R-618, 620, 633, and 645) without any hearing or notice to the respondent/ crossclaimant, Child Brothers, Inc. (See Affidavit of Randy Ludlow, attached hereto).

ARGUMENT

POINT I. THE APPELLANT'S APPEAL SHOULD BE DISMISSED SINCE THE APPELLANT HAS RECEIVED THE BENEFITS OF ITS JUDGMENT.

No matter which way this court rules as to the priority of the lien claimants' claims and the Trust Deed of the appellant, the lien claimants will still be entitled to $44,732.86 of the $1,944,732.86 bid by the appellant for the subject property. The appellant on December 8, 1977, and on December 12, 1977, stipulated and agreed, as noted in those Minute Entries, that it would only look to the subject property for the sum of $1,900,000.00. (R-443 and 453) Thereafter, on December 20, 1977, the trial court entered a Judgment and Decree of Foreclosure, (R-488) wherein the appellant was granted Judgment for $2,998,396.00. However, the Judgment and Decree of Foreclosure

noted that the appellant was to receive only $1,900,000.00 from the sale of the property, which $1,900,000.00 had been established in the Minute Entries previously referred to. At the foreclosure sale, held on January 19, 1978, the appellant bid the sum of $1,900,000.00. The appellant in actuality and effect had stipulated and been awarded by the trial court a Judgment in the amount of $1,900,000.00. The appellant's claim had been fully satisfied at the foreclosure sale.

The trial court thereafter on January 24, 1978, adjudged the mechanic's liens as having priority over the appellant's Trust Deed. (R-614). Thought the appellant was not obligated to bid in the amount of the lien claimants' claims, the appellant amended its bid to the sum of $1,944,732.86, which amount pays the Judgment of all lien claimants and the appellant. When a party consents to a Judgment or accepts the benefits of a Judgment, it is precluded from appealing to this Honorable Court. See Cornia v. Cornia, 80 Ut 486, 15 P2d 631 (1932), and Dawson v. Board of Education of Weber County, 118 Ut 452, 222 P2d 590 (1950). The appellant had consented to a Judgment in the amount of $1,900,000.00 and had, as bidder to the property, received the benefit of its Judgment. The appellant has the right to receive its Judgment in the amount of $1,900,000.00. The $44,732.88 excess which the appellant bid, under which it had no obligation to bid but chose to add to its original bid, belongs to the lien claimants herein. The entire amount as sought by both the lien claimants and the appellant having been bid, the claims of all parties have been satisfied. The appeal herein should be accordingly dismissed with the appellant ordered to pay the $44,732.86 which it is holding, to the lien claimants.

POINT II. CHILD BROTHERS, INC.'S LIEN TAKES PRIORITY OVER THE TRUST DEED OF THE APPELLANT.

Utah Code Annotated Section 38-1-5 states as follows:

> "Priority--Over other encumbrances.-- The liens herein provided for shall relate back to, and take effect as of, the time of the commencement to do work or furnish materials on the ground for the structure or improvement, and shall have priority over any lien, mortgage or other encumbrance which may have attached subsequently to the time when the building, improvement or structure was commenced, work begun, or first material furnished on the ground; also over any lien, mortgage or other encumbrance of which the lien holder had no notice and which was unrecorded at the time the building, structure or improvement was commenced, work begun, or first material furnished on the ground."

The first work performed in this matter by Child was performed on November 15, 1973. (Deposition of Eugene Child, Exh. 1) This work was done three months prior to the filing of appellant's Trust Deed on February 19, 1974. Work which was performed by Child was digging holes, locating sewer and water lines, and laying stakes to mark the lines, which work was performed with the engineers of the project. (Deposition of Eugene Child, p. 5, 48 and 49) The work of Child, by statute, has priority over the Trust Deed of the appellant since it was commenced prior to the filing of appellant's Trust Deed. The work of Child is outside the scope of Aladdin Heating Corporation v. Trustees of the Central States, 563 P2d 82 (1977 Nev.) as cited by the appellant, which case held that where there is no actual on-site construction on real property, mechanic's liens could not relate back to the time before there was any "visible signs of construction to inform prospective lenders inspecting the premises that liens had attached." At P2d 84. In the case before this court, there were actual signs of construction work which would place any

person inspecting the property on notice of the commencement of construction. The work of Child on November 15, 1973, had placed the world on notice of the commencement of its work and of its lien.

This case also does not fall under the doctrine as set forth in Western Mortgage Loan Corporation v. Cottonwood Construction Company, 18 U2d 409, 424 P2d 437 (1967) as expounded by the appellant. This Court stated at P2d 439,

> "To tack the liens for labor or materials that went into the construction of the house to the liens that may have arisen for labor and materials furnished in off-site improvements in connection with the laying out and construction of facilities used in connection with the subdivision as a whole would be going beyond the intent of the statute. The problem is one of notice. The presence of materials on the building site or evidence on the ground that work has commenced on a structure or preparatory thereto is notice to all the world that liens may have attached. However, the off-site construction in developing the subdivision for building sites would not necessarily bring to the attention of a lender that someone is claiming a lien on a particular lot in the subdivision. This is especially true as in this case, where the lender advanced money to build a home long after the subdivision had been laid out and developed. It is apparent that the persons who supplied labor or materials for the construction of roads, sewers, etc., could have filed liens for unpaid balances due them, if any. The erection of the home was separate and severable from the earlier work in developing the subdivision."

Based upon the factual situation and language set forth in Western Mortgage Loan Corporation, that case is totally inapplicable to the situation presented to the court herein. The appellant herein is foreclosing an entire subdivision, not a particular house. Child is claiming a lien on the entire area being forclosed by the appellant, not a lien against an individual home as was the case in Western Mortgage Loan Corporation. The appellant was on notice in this matter,

while there was no notice to the lender in Western Mortgage and Loan. When an entire subdivision is being foreclosed, as was the case in this matter, off-site improvements, which relate to the entire subdivision, would place a lender on notice of their existence. The notice requirement that was set forth in Western Mortgage Loan Corporation has been met by Child in this matter, making the Western Mortgage Loan case inapplicable in this situation.

The problem which must be decided by this court in determining the priority of the lien of Child to the Trust Deed of the appellant rests upon the effect of the release of all liens and claims recorded on June 22, 1976. (Deposition of Eugene Child, Exh. 3) In Boise Cascade Corporation v. Stephens, 572 P2d 1380, (1977 Utah), this court addressed the question of

> "When a materialman signs a lien waiver for material furnished and thereafter furnishes additional material on the same job, does the priority date for the subsequent material relate back to the date of first delivery?" At P2d 1380.

This court answered this question in the affirmative, noting certain limitations. The facts in this particular matter show that Child falls within the doctrine set forth in Boise Cascade Corporation. The facts previously noted are:

1. Child commenced work on the project on November 15, 1973. (Deposition of Eugene Child, Exh. 1).

2. Child continued working on the project continuously throughout the years 1974, 1975 and 1976 and performed its last work on October 1, 1976. (Deposition of Eugene Child and Exh. 1 and 2 contained therein)

3. Child was unaware of the assignment of the property from Zundel to Mountain Springs, and upon discovery, was informed by Mountain Springs that they were taking over the account of Zundel. No new account was opened for Mountain Springs but merely the account of Zundel was transferred to them. (Deposition of Eugene Child pp. 14 and 20; also Exh. 1 and 2)

4. The principal individuals involved in the project with Zundel were the same people involved in the project with Mountain Springs. (Brief of appellant p. 2)

Under the facts set forth above, Child meets the requirements set forth in the Boise Cascade Corporation case, but there is also a policy reason as to why Child should have priority over the appellant's Trust Deed. Eugene Child was informed by Mountain Springs that the only way which he could obtain his money was by taking a deed to two lots. After a considerable amount of persuasion and pleading from Pat Sinclair of Mountain Springs, Child took a Warranty Deed to lots in the project, and thereafter executed the release of lien. (Deposition of Eugene Child pp. 23 through 27) Child was not forewarned by Mountain Springs or the individual doing the title work for Mountain Springs on the subdivision, Mr. Kenyon Gurr, that the Warranty Deed would be worthless within ten (10) days because title would revert back to FDMI because of the mortgage provisions. (Deposition of Eugene Child p. 27) Child had thus traded a valuable lien priority for a worthless piece of paper. Justice Crockett in Boise Cascade Corporation stated in his concurring opinion, at P2d 1382,

> "A primary purpose of the lien statues is to guard against a laborer (or a material supplier) from working on a building and being cheated of the reward of his labor and thus avoiding evil consequences to him, his family, and the economy generally."

Child had been literally cheated out of his superior position by Mountain Springs. Such conduct by Mountain Springs should not be allowed, especially when Child has met the requirements as set forth in the Boise Cascade Corporation case.

It should be noted that Child and the appellant had entered into a Stipulation in January of 1978 wherein Child stipulated to being in a second priority position. At the hearing on January 12, 1978, the Boise Cascade Corporation case was produced by the attorney for the respondent, Bland Brothers, which case the attorney for Child had failed to find in its research and was unaware of at the time of entering into the Stipulation. The trial court, after receiving the Boise Cascade Corporation case, ruled in Child's favor, and disregarded the Stipulation previously entered. The trial court determined the Boise Cascade Corporation case to be controlling in this matter, and therefore awarded Child its priority over the Trust Deed of the appellant. The ruling of the trial court awarding the respondent, Child, priority over the appellant should be sustained.

POINT III. THE TRIAL COURT SHOULD NOT HAVE DISMISSED THE CROSSCLAIMS OF CHILD BROTHERS, INC., WITHOUT A TRIAL OR HEARING.

Motions for Summary Judgment as to the priority of the lien claims against the property had been made and argued on January 12, 1978. The trial court thereafter, on January 24, 1978, awarded the

lien claimants priority over the appellant. The attorney for Child telephoned the trial court clerk on February 1, 1978, to make sure that the trial on the Crossclaims and Counterclaims was going to be held that day. The Clerk informed the attorney for Child, after having discussed the matter with the trial judge, that there would be no trial held that day, such trial date having been vacated because of the January 24, 1978 Order. Contrary to the information given to the Crossclaimant, Child, a hearing was held on February 1, 1978 at which hearing the trial court dismissed the Crossclaim of Child and Zundel and Mountain Springs.

Child has a valid claim against Mountain Springs for the failure of warranty on the lots deeded to Child by Warranty Deed, which lots were foreclosed against by the appellant. (20 AmJur2d Covenants, Sec. 50 through 55) Equity demands that the claim of Child against Mountain Springs and Zundel be heard and not summarily dismissed as was done by the trial court. Child asks this court to reverse and remand that portion of this action which deals with the Crossclaim of Child against Zundel and Mountain Springs.

CONCLUSION

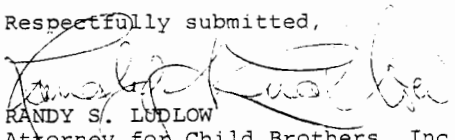
The appellant's appeal should be dismissed. The appellant has received the benefits of his Judgment and has obtained all that it desired from the sale of the property, and all that it desired in its Judgment in this matter. $44,732.86 of the $1,944,732.86 appellant bid in at the Sheriff's Sale should immediately be paid to the

respondents, and this appeal accordingly dismissed.

The trial court determination of the lien claimants having first priority over the Trust Deed of the appellant should be upheld. Child had commenced work on the subject property three months prior to the filing of the appellant's Trust Deed, and thus, by statute, and case law should be given first priority in this matter.

In the event that this court does not give Child first priority over the Trust Deed of appellant, this matter should be remanded to the trial court for a hearing on the failure of warranty of the title to the lots deeded Child by Mountain Springs.

Respectfully submitted,



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IN THE SUPREME COURT

OF THE STATE OF UTAH

FIRST OF DENVER MORTGAGE INVESTORS; and CITIBANK, N.A.	
Plaintiffs and Appellants,	A F F I D A V I T
-vs-	Case No. 15696
C. N. ZUNDEL AND ASSOCIATES, a limited partnership; et al.	
Defendants and Respondents.	

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

COMES NOW Randy S. Ludlow, being first duly sworn, deposes and states as follows:

1. That he is the attorney for Child Brothers, Inc., and has represented Child Brothers, Inc., throughout the entire proceedings in this matter.

2. That on February 1, 1978, he personally telephoned the Clerk of the District Court in Farmington, Utah, to request information concerning the trial which was supposed to be held on that date to determine whether or not said trial was still going to be held.

3. That he was informed by the Clerk of the Court that that trial date had been vacated by the trial judge.

4. That affiant then asked the Clerk to contact the Judge and ask the Judge if this matter had, in fact, been vacated.

5. That said Clerk of the Court then contacted the Judge, and informed Affiant that the Judge had stated that the trial that was to be held that day had been vacated.

6. That based upon those representations, the affiant did not appear in Farmington for a trial that day in this matter.

7. That the attorney for Zundel and the attorney for FDMI did, in fact, appear at the court that day, and requested a trial be held in this matter, upon which the trial court thereafter held trial, and dismissed the Crossclaim and Counterclaims of the respondent and crossclaimant, Child Brothers, Inc.

8. That the affiant and Child Brothers, Inc., would have appeared in court for the hearing on February 1, 1978, had it not been for the representations made to them by the Clerk of the Court.

Further affiant saith naught.

DATED this 17th day of August, 1978.

RANDY S. LUDLOW

Subscribed and sworn to before me this 17th day of August, 1978.

NOTARY PUBLIC residing at
Salt Lake City, Utah

My Commission Expires: